FILED
JAN 9 1992
OFFICE OF THE CLERK

No. 91-699

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOSEPH J. WALTMAN,

Petitioner,

vs.

FAHNESTOCK & CO., INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LEE D. UNTERMAN*
PATRICIA L. MOORE
BROUDY & JACOBSON
Attorneys for Respondent
230 Park Avenue
New York, New York 10169
(212) 953-0900

* *Counsel of Record*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
OPINION BELOW.....	1
JURISDICTION.....	2
STATUTES INVOLVED.....	2
PROCEDURAL HISTORY.....	2
STATEMENT OF THE FACTS.....	6
REASONS TO DENY THE WRIT.....	12
PRELIMINARY STATEMENT.....	12
A. THIS COURT HAS ALREADY DETERMINED THAT FEDERAL SUBSTANTIVE LAW DOES NOT ENTIRELY PREEMPT THE FIELD OF ARBITRATION.....	15
B. WHERE FEDERAL JURISDICTION IS BASED ON DIVERSITY, THE PROPRIETY OF AN AWARD OF PUNITIVE DAMAGES IS CONTROLLED BY FORUM STATE LAW.....	18
CONCLUSION.....	22

TABLE OF AUTHORITIES

Page

CASES CITED

AT&T Technologies v. Communications Workers of America, 475 U.S. 643, 648 (1986)..... 17

Barbier v. Shearson Lehman Hutton, Inc., 948 F.2d 117 (2d Cir. 1991)..... 17

Browning-Ferris Indus. v. Kelco Disposal Inc., 92 U.S. 257, 278 (1989)..... 13, 19

Erie v. Tompkins, 304 U.S. 64 (1938)..... 19

Garrity v. Lyle Stuart, Inc., 86 N.Y.S.2d 831 (1976).....14, 16, 17

Herzfeld & Stern, Inc. v. Beck, 572 N.Y.S. 2d 683 (1st Dept. 1991)..... 1

Hines v. Davidowitz, 312 U.S. 52, 67 (1941)..... 16

Juster v. Rothschild, Unterberg, Towbin, 554 F.Supp. 331 (S.D.N.Y. 1983)..... 19

Leidesdorf v. Fireman's Fund Ins. Co., 470 F.Supp. 82 (S.D.N.Y. 1979)..... 19

Pag

CASES CITED (continued)

Matthews v. CTI Container Transport Inter Inc., 871 F.2d 270 (2d Cir. 1989)..... 19

Shu-Tao Lin v. McDonnell Douglas, 742 F.2d 45, 49 (2d Cir. 1984)..... 19

Volt Information Sciences v. Board of Trustees, 489 U.S. 468, 477 (1989).....14, 15, 16, 17

STATUTES AND RULES CITED

Title 28 U.S.C. 1254(1)..... 2

Federal Arbitration Act, 9 U.S.C. 10..... 2

Federal Arbitration Act, 9 U.S.C. 1, et seq..... 15

OPINION BELOW

The Respondent, Fahnestock & Co., Inc. ("Fahnestock"), respectfully urges this Court to deny the Petition of Joseph J. Waltman ("Waltman") for a writ of certiorari, to review the decision of the United States Court of Appeals for the Second Circuit in this case.* That

---

*- If this Court grants the instant Petition, the Respondent urges this Court to simultaneously reconsider the question presented in Fahnestock's prior Petition for a writ of certiorari filed on September 9, 1991, Index No. 91-508, and previously denied by this Court on November 4, 1991 based upon the subsequent publication of a decision by New York's Appellate Division. In Herzfeld & Stern v. Beck, 572 N.Y.S.2d 683 (1st Dept. 1991), New York's Appellate Division made it clear that as Fahnestock contended, relevant statements made in a mandated filing are absolutely privileged. Fahnestock's Petition sought review of the Second Circuit's opinion on the question of whether statements made in filings mandated by regulatory authorities were absolutely privileged. Waltman's Petition seeks review of that portion of the Second Circuit opinion dealing with the issue of punitive damages.

opinion is reported at 935 F.2d 512 (1991).

JURISDICTION

This Court has jurisdiction pursuant to Title 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Federal Arbitration Act, Title 9 U.S.C. 10.

PROCEDURAL HISTORY

The origin of this matter is an NYSE arbitration between Fahnestock and its former employee, Joseph Waltman. Fahnestock initiated that proceeding in January 1989 seeking to recover certain files it believed Waltman wrongfully retained after his termination. Waltman filed a counterclaim in that proceeding against Fahnestock, its chairman, president and general counsel, alleging, inter alia, wrongful discharge and

defamation.

At the conclusion of the hearings, conducted entirely in New York, the arbitrators rendered an award (the "Award") dismissing Fahnestock's claim for recovery of its files and dismissing Waltman's claims against Fahnestock's chairman, president and general counsel. However, the arbitrators granted Waltman compensatory, defamation and punitive damages as against Fahnestock.

Invoking diversity jurisdiction (although he had worked out of Fahnestock's New York office, Waltman was a resident of Pennsylvania and Fahnestock was a New York corporation), Fahnestock thereafter filed a Petition with the United States District Court for the Southern District of New York seeking to vacate the Award to the extent it rendered an award for

defamation and granted punitive damages. In substance, Fahnestock argued that the arbitrators had exceeded their powers and ignored the law in rendering an award for defamation based upon Fahnestock's filing of a post-termination form mandated by the NASD. Fahnestock argued that relevant statements made in such regulatory filings were protected by an absolute privilege. Fahnestock also contended that the arbitrators exceeded their powers in rendering an award for punitive damages.

Fahnestock's Petition was granted in part and denied in part in an Opinion and Order of the United States District Court for the Southern District of New York (Judge Peter K. Leisure) dated August 22, 1990. Judge Leisure found that the arbitrators had exceeded their powers in rendering an award of punitive

damages, and, accordingly, vacated that portion of the Award.

Fahnestock timely appealed from that portion of the District Court's decision which refused to vacate the Award for defamation. Waltman cross-appealed from that portion of the decision which vacated the Award of punitive damages.

By decision dated June 10, 1991, the Second Circuit Court of Appeals affirmed the District Court's decision in all respects. Thereafter, Fahnestock timely filed a Petition for a writ of certiorari seeking to have this Court review that portion of the Second Circuit's decision as to the privilege applicable to statements made in mandated filings. That Petition was denied by this Court on November 4, 1991. The instant Petition by Waltman now seeks to have this Court review that portion of the Second Circuit's decision

which affirmed the District Court's vacatur of the award of punitive damages.

STATEMENT OF THE FACTS

Fahnestock is a member of the New York Stock Exchange ("NYSE"), engaged in business as a full-service stock brokerage firm with its principal place of business in New York City. In or about March 1982, Fahnestock employed Petitioner Waltman as a registered representative working primarily out of its New York offices. Fahnestock later requested that Waltman undertake to manage and build Fahnestock's insurance business and that he oversee the licensing of its salesmen and the sale of its insurance and annuity products. Waltman was employed by Fahnestock as an employee at will, there being no written employment agreement between Waltman and

Fahnestock.

On or about December 12, 1988, Waltman's employment was terminated by Fahnestock. In connection with that termination, and as required by the rules and regulations of the NYSE and the NASD, on or about January 4, 1989, Fahnestock filed a Uniform Termination Statement (a preprinted form prescribed by the NASD and more commonly referred to as "Form U-5") disclosing Waltman's termination.

Thereafter, Fahnestock discovered that its insurance files, including those relating to the insurance licensing of its registered representatives, were not to be found on Fahnestock's New York premises. Believing that Waltman possessed the missing files, Fahnestock contacted Waltman and requested that he return such files. Waltman, however, contended

that the files belonged to him. Accordingly, a dispute arose over the ownership and possession of such files.

Failing in efforts to amicably resolve that dispute, on or about January 27, 1989, Fahnestock filed a Statement of Claim with the Arbitration Department of the NYSE seeking the return of those files. That claim alleged solely that Waltman had wrongfully taken Fahnestock's files and sought an order directing their return. Shortly after the filing of its Statement of Claim, and again in accordance with the rules and regulations of the NYSE and NASD, Fahnestock also filed an Amended Form U-5, changing only one "NO" answer to a "YES" answer so as to truthfully disclose its dispute with Waltman.

More specifically, Question 15 on the printed Form U-5 asks:

	Yes	No
15. Currently, or at termination, was the individual under internal review for fraud or wrongful taking of property, or violating investment-related statutes, regulations, rules or industry standards of conduct?...	☐	☐

While Fahnestock had checked the "NO" box on the Form U-5 filed at the time of Waltman's termination, on or about February 2, 1989, Fahnestock amended that filing by checking the "YES" box in response to Question 15. No other changes were made on the Form U-5.

On or about March 20, 1989, Waltman served an answer in the NYSE arbitration and counterclaimed against Fahnestock, its chairman, president and general counsel. Waltman denied Fahnestock's allegations and asserted, by way of counterclaims, in pertinent part, his wrongful termination and that Fahnestock

had defamed him in filing the Amended U-5.

On or about January 19, 1990, the arbitrators rendered their Award. Contrary to the statements contained in Waltman's present Petition, the arbitrators clearly did not find that Waltman had proved that Fahnestock's chairman had threatened Waltman with arrest if he did not return Fahnestock's files or that Fahnestock's chairman had directed that the Amended U-5 be filed in such a way as to indicate that Waltman had been fired for cause. If anything, the opposite was true, for although the arbitrators heard contradictory testimony on these points, the arbitrators in their Award specifically dismissed all of Waltman's counterclaims against Fahnestock's chairman, its president and general counsel. Similarly, although Waltman's

Petition seeks to imply to the Court that the arbitral Award was based on Fahnestock's alleged course of conduct in attempting to damage Waltman's career, the Award itself makes no such statement and characterizes Waltman's counterclaims as merely being a claim for defamation arising from the filing of the Amended U-5.

Upon receiving the Award, Fahnestock commenced this challenge believing the arbitrators to have ignored the law as to the absolute privilege that applies to statements made in mandated filings, and believing the arbitrators to similarly have ignored New York law prohibiting arbitrators from rendering punitive damage awards absent a contractual agreement to present such issues to arbitration.

REASONS TO DENY THE WRIT

I. THIS COURT HAS PREVIOUSLY DECIDED THAT FEDERAL SUBSTANTIVE LAW DOES NOT PREEMPT THE ENTIRE FIELD OF ARBITRATION AND HAS ALSO PREVIOUSLY DECIDED THAT IN DIVERSITY CASES, THE PROPRIETY OF AN AWARD OF PUNITIVE DAMAGES IS A QUESTION OF STATE LAW

PRELIMINARY STATEMENT

Contrary to the impression Waltman seeks to create in his Petition, the issue raised on this appeal is not new or novel and is not one on which the Circuits are in conflict. Contrary to Waltman's characterization of the question presented on this appeal, the issue at hand is not whether the Federal Arbitration Act empowers arbitrators to award punitive damages or whether the Second Circuit's interpretation of that Act is at odds with that of the other Circuits. Rather, the decision under review is merely a decision by a federal court interpreting New York State substantive law on the availability of

punitive damages. Accordingly, the only conceivable question to review is whether the Second Circuit found and applied controlling New York law on this point.

Proceeding in federal court pursuant to diversity jurisdiction, the Southern District and Second Circuit correctly applied New York State law to determine whether or not this particular arbitration panel had the authority to award punitive damages. Contrary to Waltman's contention, the Circuits are not in conflict on the issue of whether state or federal substantive law applies in such a circumstance. Indeed, as the Second Circuit pointed out in the decision under review, this Court has already held that the propriety of an award of punitive damages in a diversity case is a question of state law. Browning-Ferris Indus. v. Kelco Disposal

Inc., 492 U.S. 257, 278 (1989).

Since it is undisputed that New York State law deprives arbitrators of the authority to award punitive damages, Garrity v. Lyle Stuart, Inc., 386 N.Y.S.2d 831 (1976), and there is no conflict among the Circuits as to the applicability of state law under these specific circumstances, there is no issue for this Court to decide which it has not already addressed.

Seeking to avoid the impact of Garrity, Waltman also argues that federal substantive law has so engulfed the field of arbitration as to preempt applicable state law. However, contrary to Waltman's contentions, this Court has also already held that the body of so-called federal substantive law does not totally preempt the entire field of arbitration. Volt Information Sciences v. Board of Trustees, 489 U.S. 468, 477

(1989). Since the preemption question has already been disposed of by this Court, there is no reason for the Court to reconsider that issue on these facts.

A. THIS COURT HAS ALREADY DETERMINED THAT FEDERAL SUBSTANTIVE LAW DOES NOT ENTIRELY PREEMPT THE FIELD OF ARBITRATION

While Waltman would have this Court find that the Federal Arbitration Act, 9 U.S.C. 1, et seq. ("FAA"), creates a body of federal substantive law which completely pre-empts state law with respect to the entire field of arbitration, this Court has already held in Volt, supra, that such is not the case. Waltman would also seem to have this Court find that simply because Fahnestock's underlying Petition to vacate the Award was brought in a federal court, a fortiori federal substantive law must govern the question of whether the arbitrators had the power

to render an award of punitive damages. That contention is similarly erroneous.

In Volt, this Court specifically held that the FAA does not create a body of federal substantive law which pre-empts the entire field of arbitration. Rather, state law will only be pre-empted "to the extent that it actually conflicts with federal law." Id. at 477. Stated differently, preemption is found only where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

As Judge Leisure stated in the Southern District opinion, New York State substantive law as set forth in Garrity regarding the inability of arbitrators to award punitive damages is not in direct or actual conflict with

any express provision of the FAA. At best, the purpose of the FAA was to require only that parties comply with their private agreements to arbitrate. Garrity does not stand as an obstacle to that purpose. The Second Circuit again made this clear as recently as three months ago in Barbier v. Shearson Lehman Hutton, Inc., 948 F.2d 117 (2d Cir. 1991). A party cannot be compelled to submit to arbitration any dispute which he has not agreed to so submit. AT&T Technologies v. Communications Workers of America, 475 U.S. 643, 648 (1986). Thus, contrary to the argument made by Waltman, this Court has already decided that the FAA does not entirely preempt this field and Volt does not mandate resort to federal substantive law to dispose of the instant issue.

B. WHERE FEDERAL JURISDICTION IS BASED ON DIVERSITY, THE PROPRIETY OF AN AWARD OF PUNITIVE DAMAGES IS CONTROLLED BY FORUM STATE LAW

Waltman's Petition also casually ignores the fact that the underlying arbitration was not brought pursuant to the Federal Arbitration Act. Rather, federal jurisdiction in this proceeding, brought after the fact as a vehicle to vacate the Award, was predicated on diversity of citizenship of the parties. The underlying arbitration was an NYSE arbitration, held in the State of New York and governed by the laws of that state. The underlying claims of both Fahnestock and Waltman were similarly subject only to New York law. Indeed, focusing for the moment only on Waltman's counterclaim for defamation, it could only be resolved as a matter of New York law since there is no federal substantive law of defamation.

Accordingly, it is axiomatic that pursuant to Erie v. Tompkins, 304 U.S. 64 (1938), a federal court considering this issue would have no choice but to apply the law of the forum state. Under such circumstances, federal law mandates that a federal court look to state law for determining the availability of damages, including the availability of punitive damages. See e.g., Browning-Ferris, supra; Matthews v. CTI Container Transport Inter Inc., 871 F.2d 270 (2d Cir. 1989); Juster v. Rothschild, Unterberg, Towbin, 554 F.Supp. 331 (S.D.N.Y. 1983); Leidesdorf v. Fireman's Fund Ins. Co., 470 F.Supp. 82 (S.D.N.Y. 1979).

Similarly, the measure of damages generally, in a diversity case, is a matter controlled by state substantive law. See, e.g., Shu-Tao Lin v.

McDonnell Douglas, 742 F.2d 45, 49 (2d Cir. 1984).

Here, arbitration was invoked pursuant to the Rules of the NYSE and the underlying dispute is one between a New York employer (Fahnestock) and its former employee, employed in its New York office (Waltman). Federal jurisdiction was never sought or acquired in connection with the commencement of the underlying arbitration or the enforceability of the NYSE rules requiring members and their employees to submit their disputes to arbitration. Both Fahnestock and Waltman could have proceeded in New York State court to enforce or vacate the Award.

The theory being advanced by Waltman would yield an anomalous and irrational result. If Waltman is arguing that federal substantive law applies to the

remedy imposed by the arbitrators in the instant case solely because the Petition to vacate was brought in federal, as opposed to state, court, such a holding would act to encourage and reward forum-shopping. Where parties have not contractually agreed to arbitrate the issue of punitive damages, parties to New York arbitral awards which include punitive damages would face different results depending upon whether confirmation was sought in New York state as opposed to federal courts. This would produce a race to the courthouse, as victorious parties would seek to confirm in federal court before the losing party could run to state court to get the award vacated. The same forum shopping would occur among Districts and Circuits. Such a result is neither the letter nor the intent of the law. The outcome should be the same

whether Fahnestock or Waltman sought to confirm or vacate in New York's state or federal courts or whether, by virtue of diversity, confirmation or vacatur was sought in some other District or Circuit. Any federal court, whose jurisdiction was invoked by virtue of diversity, should reach the same result. This Court has already made it clear that under such circumstances, the laws of the forum state must apply. The law of this forum state, New York, is clear. Arbitrators under these facts are not empowered to award punitive damages and the Second Circuit correctly found such state law to be controlling.

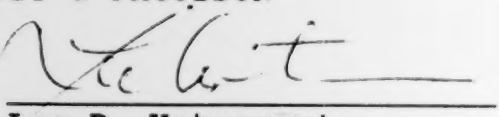
CONCLUSION

For the reasons set forth above, Waltman's Petition for a writ of

certiorari should be denied.

Respectfully submitted,

BROUDY & JACOBSON

By: 

Lee D. Unterman*
Patricia L. Moore
Attorneys for Respondent
230 Park Avenue
New York, New York 10169
(212) 953-0900

* Counsel of Record